

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

age-related retirement benefits without an appropriate offset; (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether it properly required recovery of the overpayment by deducting \$34.07 every 28 days from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On October 7, 1998 appellant, then a 50-year-old rural mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 1, 1998 she injured her back while bending down to pick up a tray of mail while in the performance of duty. OWCP accepted the claim for lumbar sacral strain with radiculopathy and a herniated disc at L5-S1. Appellant stopped work on June 4, 1999 and underwent an OWCP-authorized decompression, laminectomy, and discectomy at L4-5.

On May 7, 2002 OWCP notified appellant of her placement on the periodic rolls, effective April 21, 2002. It advised her to report any retirement income she received from any federal agency, including benefits received under the Federal Employees Retirement System (FERS). OWCP noted that "If you are covered under FERS, OWCP must deduct from your compensation entitlement at least part of any Social Security Retirement benefits to which you are entitled based on age. This is because a portion of FERS benefits is included in Social Security retirement benefits." By her signature dated May 14, 2002, appellant acknowledged the terms and conditions under which she could receive compensation.

Appellant returned to part-time limited-duty work on September 21, 2004 and worked in a part-time capacity until her retirement, effective October 31, 2009. OWCP paid her wage-loss compensation on the periodic rolls.<sup>3</sup>

In an April 27, 2010 letter, OWCP issued an election letter to appellant advising her that she was not entitled to concurrently receive both FECA wage-loss compensation and Office Personnel Management retirement benefits and that she must elect which benefit to receive. It also advised her that "FECA benefits will be reduced by the Social Security Act benefits paid on the basis of age and attributable to your federal service." In a June 1, 2010 letter, OWCP advised appellant that compensation benefits would be reduced if she began receiving SSA retirement benefits based upon her age and federal service. It noted that failure to report receipt of such retirement benefits could result in an overpayment of compensation which could be subject to recovery. In a June 7, 2012 letter, OWCP again advised appellant that FECA benefits would be reduced by SSA benefits paid on the basis of age and federal service.

On August 24, 2017 OWCP requested that SSA provide information regarding appellant's retirement benefits based upon age and federal service. On October 4, 2017 SSA provided OWCP with a FERS/SSA dual benefit calculation worksheet setting forth her SSA rates with FERS and without FERS from July 2014 through December 2016. The SSA rates with FERS/without FERS were reported as: \$1,191.60/\$86.50 for July 1, 2014; \$1,211.80/\$87.90 for December 1, 2014; \$1,211.80/\$87.90 for December 1, 2015; and \$1,215.40/\$88.10 for December 1, 2016.

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<sup>3</sup> Appellant continued to receive partial disability wage-loss compensation based upon her loss of wage-earning capacity.

Effective October 15, 2017, OWCP offset appellant's FECA benefits by the amount of her SSA age-related retirement benefits attributable to her federal employment under FERS.

OWCP also calculated an overpayment amount of \$44,476.90 for the period covering July 1, 2014 through October 14, 2017. It found an overpayment of \$5,574.08 resulted for the period July 1 to November 30, 2014; \$13,523.85 for the period December 1 to November 30, 2015; \$13,560.90 for the period December 1, 2015 to November 30, 2016; and \$11,818.07 for the period December 1, 2016 to October 14, 2017. The overpayment was determined by subtracting the SSA rate without FERS from the SSA rate with FERS to get the monthly FERS offset amount, which it then converted to the 28-day offset amount to be deducted from the periodic rolls payments based on the number of days in each corresponding period.

In a preliminary overpayment determination dated October 30, 2017, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$44,476.90 for the period July 1, 2014 through October 14, 2017 because it had failed to reduce her wage-loss compensation by the portion of her SSA age-related retirement benefits that were attributable to her federal service. It further advised her of its preliminary overpayment determination that she was without fault in the creation of the overpayment because she was not aware nor could she have been reasonably expected to know that OWCP had incorrectly paid compensation. OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

Appellant subsequently submitted a completed Form OWCP-20 dated November 8, 2017. She indicated that, after she retired, she used her savings to pay down her bills. Appellant indicated that she was living month-to-month and still trying to pay off her bills.

On March 6, 2018 OWCP issued two new preliminary overpayment determinations which superseded the initial October 30, 2017 preliminary overpayment determination. It made a preliminary overpayment determination that appellant was overpaid in the amount of \$28,027.37 for the period July 1, 2014 through July 28, 2016 because her FECA compensation was not reduced by the FERS portion of her SSA age-related retirement benefits. OWCP found that she was without fault in the creation of this overpayment. It also made a preliminary overpayment determination that appellant was overpaid in the amount of \$16,449.52 from July 29, 2016 to October 14, 2017 because she also received FECA benefits that were not reduced by the FERS portion of her SSA age-related retirement benefits. OWCP found that she was with fault in the creation of the \$16,449.52 as she knowingly accepted payments which she knew or reasonably should have known to be incorrect. It provided appellant with an overpayment action request form and a Form OWCP-20 for her completion.

On March 27, 2018 appellant, through counsel, requested a prerecoupment hearing on the March 6, 2018 preliminary overpayment determinations before a representative of OWCP's Branch of Hearings and Review.

By decision dated July 24, 2018, an OWCP hearing representative conducted a preliminary review and found that the case was not in posture for a hearing. She found that appellant had

received a \$44,476.90 overpayment of compensation as she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period July 1, 2014 to October 14, 2017 without an appropriate offset. The hearing representative remanded the case for a proper analysis on the issue of fault for the period July 1, 2014 to July 28, 2016.

In a September 13, 2018 preliminary overpayment determination, OWCP found that appellant received an overpayment of compensation in the amount of \$28,027.37 for the period July 1, 2014 through July 28, 2016, for which she was with fault, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. It advised that she was provided notice on three separate occasions that her SSA age-related retirement benefits attributable to FERS were subject to offset and she had displayed her understanding of the subject when she completed her EN1032 forms. Thus, OWCP found that appellant knowingly accepted compensation to which she was not entitled. It provided her with a new Form OWCP-20.

By decision dated January 17, 2019, OWCP finalized its March 6 and September 13, 2018 preliminary overpayment determinations, finding an overpayment of compensation in the amount of \$44,476.80 for the period July 1, 2014 through October 14, 2017 as appellant had received wage-loss compensation from OWCP without an appropriate offset for age-related SSA benefits attributable to FERS. It further found that she was at fault in the creation of the overpayment and thereby precluded from waiver of recovery of the overpayment. OWCP further determined that the overpayment would be recovered by withholding \$34.07 every 28 days from appellant's continuing compensation payments.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.<sup>4</sup> Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>5</sup>

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.<sup>6</sup> FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(d); *see T.B.*, Docket No. 18-1449 (issued March 19, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$44,476.90 for the period July 1, 2014 through October 14, 2017 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits.

OWCP paid appellant appropriate wage-loss compensation for total disability following her injury. It subsequently paid her wage-loss compensation for partial disability after her return to work. Beginning July 1, 2014, appellant received SSA age-related retirement benefits. As noted, a claimant cannot receive compensation for wage-loss compensation and SSA retirement benefits attributable to federal service for the same period.<sup>8</sup> The information provided by SSA indicated that a portion of appellant's SSA age-related retirement benefits were attributable to her federal service. As OWCP neglected to offset her FECA benefits for the period July 1, 2014 through October 14, 2017, she received an overpayment of wage-loss compensation.<sup>9</sup>

Based on the rates provided by SSA, OWCP calculated the overpayment of compensation by determining the portion of SSA age-related retirement benefits that were attributable to appellant's federal service. It received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided appellant's SSA rate with FERS and without FERS for specific periods beginning July 1, 2014.<sup>10</sup> OWCP provided its calculations of the amount that it should have offset for each relevant period based on the SSA worksheet. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$44,476.90 creating an overpayment of compensation in that amount.

### **LEGAL PRECEDENT -- ISSUE 2**

5 U.S.C. § 8129(b) provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."<sup>11</sup> A claimant who is at fault in the creation of the overpayment is not entitled to

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<sup>7</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>8</sup> *Supra* note 7; *V.B.*, Docket No. 19-1082 (issued October 29, 2019); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

<sup>9</sup> *Id.*

<sup>10</sup> SSA's worksheet provided applicable rates effective the following dates: July 1 to November 30, 2014; December 1 to November 30, 2015; December 1, 2015 to November 30, 2016; and December 1, 2016 to October 14, 2017.

<sup>11</sup> 5 U.S.C. § 8129(b).

waiver.<sup>12</sup> On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.<sup>13</sup>

With respect to whether an individual is with fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP has not met its burden of proof to establish that appellant was at fault in the creation of the overpayment for the period July 1, 2014 through October 14, 2017.

As noted above, the Federal (FECA) Procedure Manual identifies that, regarding an SSA dual benefits scenario, where the claimant receives SSA age-related retirement benefits as part of an annuity and wage-loss compensation under FECA, resulting in an overpayment, the claimant should be found not at fault unless there is evidence on file that the claimant was aware that the receipt of full SSA age-related retirement benefits concurrent with disability/wage-loss compensation was prohibited.<sup>15</sup> Because of the complex nature of SSA benefits administration, appellant could not have been expected to be able to calculate the amount of an offset. Therefore, she could not reasonably have been aware during the relevant period that her concurrent receipt of SSA benefits constituted an actual prohibited dual benefit.<sup>16</sup>

As previously noted, to determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>17</sup> Therefore, based on the circumstances described, the Board finds that OWCP has not met its burden of proof to establish that appellant

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<sup>12</sup> See *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

<sup>13</sup> 20 C.F.R. § 10.433(a).

<sup>14</sup> *Id.* at § 10.433(b); see also *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Fault Determinations*, Chapter 6.300.4g(4) (September 2018).

<sup>16</sup> *H.H.*, Docket No. 18-0674 (issued September 3, 2020); *G.G.*, Docket No. 19-0684 (issued December 23, 2019) (The Board affirmed OWCP's finding that, due to the complexity of SSA age-related retirement benefits administration, appellant was not with fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP determined that appellant was not expected to be able to calculate the amount of the offset.).

<sup>17</sup> *Id.* at § 10.433(b); see also Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(d) (September 2018).

was at fault in the creation of the overpayment for the period July 1, 2014 through October 14, 2017.

As the Board finds that appellant was not at fault in the creation of the overpayment for the period July 1, 2014 through October 14, 2017, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment.<sup>18</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$44,476.90 for the period July 1, 2014 through October 14, 2017 because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits. The Board further finds that she was not at fault in the creation of the overpayment during the above-noted period and that the case will be remanded to OWCP to consider waiver of recovery of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 16, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>18</sup> In light of the Board's disposition of issue 2, issue 3 is rendered moot.